

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIAApplication of Tenby, Inc. for Modification or
Clarification of Resolution No. G-3304.Application 01-12-042
(Filed December 21, 2001)Application of Southern California Gas Company
(U 904 G) for Modification or Clarification of
Resolution G-3304.Application 01-12-050
(Filed December 13, 2001)**OPINION REGARDING THE APPLICATIONS TO
MODIFY OR CLARIFY RESOLUTION G-3304****Summary**

Today's decision addresses the applications filed by Tenby, Inc. (Tenby) and Southern California Gas Company (SoCalGas) to modify or clarify Resolution G-3304 (Resolution). Effective December 21, 2000, the Resolution suspended the transfer of customers to core subscription service or other core service schedules except for those customers whose gas service providers were no longer offering service in California.

Tenby contends that it entered into a contract with SoCalGas on December 7, 2000 for GN-10 service beginning on January 1, 2001, and that the Resolution therefore does not apply to Tenby. SoCalGas contends that no written contract was executed by SoCalGas granting Tenby's request, and that the Resolution prevented SoCalGas from allowing Tenby to take such service.

The Commission generally disfavors issuing a decision in response to a request for declaratory relief or for an advisory opinion, unless extraordinary

circumstances exist or if the matter is of widespread public interest. Tenby and SoCalGas have not convinced us that extraordinary circumstances exist or that this matter is of widespread public interest which warrants the issuance of a decision which modifies or clarifies Resolution G-3304. In addition, since Tenby's civil action is seeking an award of damages from SoCalGas, that is a remedy that can only be obtained in Superior Court. Accordingly, the applications to clarify or modify the Resolution are denied.

Background

Tenby operates an enhanced crude oil recovery business in Oxnard, California. Tenby uses most of the natural gas to generate steam, which is injected into the ground to extract the crude oil.

The events which resulted in this dispute occurred when natural gas prices in California rose to unprecedented levels during the winter to spring of 2000-2001. According to Tenby's application, BP Energy (BP) was Tenby's gas supplier from September 1, 1999 until about December 30, 2000. Tenby purchased natural gas from BP at the California/Arizona border, and SoCalGas transported the gas to Tenby's facility pursuant to a Master Service Contract and Intrastate Transmission Agreement (Master Service Contract).

On November 30, 2000, BP provided Tenby with 30 days' notice that it was going to terminate its gas supply service contract. Tenby then contacted SoCalGas. According to Tenby, after repeated solicitations from SoCalGas and other providers, Tenby elected to enter into a "core subscription" contract with SoCalGas. Tenby states that in accordance with SoCalGas' instructions, it accepted SoCalGas' offer of "core subscription service" by sending SoCalGas a written notice, dated December 7, 2000, which states:

“Per our conversation, Tenby, Inc. hereby provides written notice of the termination of our Master Service Contract and our Interstate Transmission Agreement effective December 31, 2000. We elect to take service under SoCal Gas tariff schedule number GN-10, effective January 1, 2001.” (Declaration Of Julie Chase, Ex. A.)¹

On December 11, 2000, SoCalGas filed Advice Letter Nos. 2978 and 2979 with the Commission.² These advice letters proposed that the Commission establish two classes of core subscription customers. The first class would consist of existing core subscription customers who would be allowed to continue to pay a core subscription rate tied to SoCalGas’ overall gas acquisition effort on behalf of core and core subscription customers. The second class would consist of those core subscription customers who elected core subscription service to be effective beginning January 1, 2001 or later. Since the deviations that SoCalGas was requesting would have changed the rates for those services, Tenby submitted a letter to the Commission on December 12, 2000 in opposition to SoCalGas’ request.

¹ Although Tenby refers to “core subscription” or “core subscription service” at different places in its pleadings, the December 7, 2000 letter referred to “GN-10” service. GN-10 service is for core service, while core subscription service is Schedule G-CS service.

² Advice Letter Nos. 2978-A and 2979-A were filed on December 12, 2000.

Resolution G-3304 was adopted by the Commission on December 21, 2000. In that Resolution, the Commission denied the requests contained in Advice Letters 2978, 2978-A, 2979, and 2979-A.³ Ordering Paragraph 2 of the Resolution ordered SoCalGas “to suspend transfers of customers to core subscription service, Schedule G-CS or applicable core service schedules except for those customers where their gas service provider is no longer offering service in California.” Ordering Paragraph 3 of the Resolution also ordered SoCalGas to “file a new advice letter with tariff language that implements the provision of OP #2 within 7 days,” and stated that the effective date of that advice letter would be December 21, 2000, subject to the Energy Division’s review of the advice letter for compliance with the Resolution.

A copy of the Resolution was obtained by Tenby on December 26, 2000. According to Tenby, SoCalGas’ representatives informed Tenby that it might find the Resolution to be “disappointing.” In response to further inquiries, Tenby received a voice message on the afternoon of December 28, 2000 indicating that Tenby “should ‘set things up with a marketer,’ so it would not be hit with SoCalGas’ expensive imbalance penalties.” (A.01-12-042 Application, p. 5.) On December 29, 2000, Tenby received an electronic note from SoCalGas informing Tenby that it was still a transportation-only customer. (Declaration Of Julie Chase, Ex. D.) Tenby alleges that because “of SoCalGas’ breach of its existing contract with Tenby and unwarranted threat of costly gas imbalance penalties,

³ Ordering Paragraph 1 of the Resolution mistakenly referenced AL “2978” twice. The second reference to AL 2978 should have been to AL 2979, as evidenced by the other citations to AL 2979 throughout the Resolution. (See Declaration of Julie Chase, Ex. C, p. 12.)

Tenby was forced to scramble in the remaining hours before the end of the year holiday and entered into a costly gas service contract with another provider on Friday, December 29, 2000.”⁴ (A.01-12-042 Application, p. 5.)

As a result of the above events, Tenby contacted the Commission and was directed to the Energy Division. Letters supporting the positions of both Tenby and SoCalGas were reviewed and a teleconference was held with the parties on January 31, 2001. Following the teleconference, on or about January 31, 2001, the Energy Division staff sent an electronic note to both Tenby and SoCalGas which states in part:

“The following is an informal opinion of the Energy Division, and it is not binding on the Commission:

“Tenby applied for core service (GN-10) in writing on December 7, 2000. Tenby elected to take that service on January 1, 2001.

“It appears that there are no other non-core customers that made such a request in writing.

“Tenby initiated its request prior to SoCalGas filing Advice Letter 2978 and 2979 on December 11, 2000 and 2978-A and 2979-A on December 12, 2000. Tenby initiated its request prior to the Commission’s Resolution G-3304 on December 21, 2000.

“Application for core service (GN-10) does not require a signed contract.

“BP Energy was and still is providing gas to Tenby.

⁴ Tenby’s provider of gas in January 2001 was BP.

“Ordering Paragraph #2 of G-3304 directed SoCalGas to ‘...suspend transfers of customers to ... applicable core service schedules except for those customers where their gas service provider is no longer offering service in California.’

“As a matter of equity, it appears that Tenby’s date of transfer (although not effective date) to be a GN-10 customer should be December 7, 2000 in light of the significant and unexpected events that occurred during the interval between its request on December 7, 2000 and its requested effective date of January 1, 2001.” (Declaration Of Julie Chase, Ex. H.)

Following the Energy Division’s electronic note to Tenby and SoCalGas regarding the informal opinion, SoCalGas began to provide Tenby with core GN-10 service on February 1, 2001.

In response to Ordering Paragraphs 2 and 3 of the Resolution, SoCalGas filed Advice Letter 2981 with the Commission on December 28, 2000. The advice letter contained the following language under the heading of “Requested Tariff Changes”:

“As a further clarification, customers taking non-core transportation service on December 21, 2000, will not be eligible for core subscription or core service, except as identified in the above applicability statement, even if they requested the transfer prior to December 21, 2000, since such service would not begin until January 1, 2001, which is after the effective date of Resolution G-3304.” (Declaration Of Julie Chase, Ex. I, p. 3.)

On February 2, 2001, the Energy Division notified SoCalGas by letter about the effective date of the tariff sheets attached to Advice Letter 2981. The letter also stated that:

“In the Advice Letter itself, the last full paragraph in the section Requested Tariff Changes which begins, ‘As a further clarification...’ and ends, ‘after the effective date of Resolution G-3304’ should be deleted since this narrative goes beyond compliance with Resolution G-3304.” (Declaration Of Julie Chase, Ex. J.)

According to Tenby’s application, it suffered damages as a result of the following:

“Tenby suffered damages when it was forced to scramble in the remaining business hours of 2000 and enter into a costly gas supply contract in order to cover SoCalGas’ breached contract. Because of the dramatic increase in the cost of gas, Tenby was forced to curtail its steam injection operations for that month in order to mitigate its damages. That is, Tenby [sic] costs of operation would greatly exceed its profit if it remained at full operational status. Tenby still suffered losses, but it was able to mitigate its losses by curtailing its steam injection operations. (Tenby used only 17,784 MMBTUs of natural gas in January, 2001 rather than the typical monthly use of approximately 30,000 MMBTUs.)

“The production of crude oil is a cyclical process occurring over several months. Accordingly, curtailment of steam injection operations affects oil production for approximately five (5) months afterward.” (A.01-12-042 Application, pp. 7-8, citations omitted.)

On September 25, 2001, Tenby filed a civil lawsuit against SoCalGas in Los Angeles Superior Court, Case No. BC258497. The lawsuit seeks damages in the approximate amount of \$404,000 plus interest as a result of the events described above.

In a stipulation filed with the Superior Court on January 22, 2002, Tenby and SoCalGas agreed to stay the lawsuit until the Commission issues a decision

on the two petitions for modification of the Resolution. This stipulation was confirmed in a January 22, 2002 order of the Superior Court. (Case No. BC258497, Parties' Stipulation and Order To Stay Proceedings Pending Public Utilities Commission Decision, p. 4.)

On December 13, 2001, SoCalGas filed its "Application For Modification Or Clarification Of Resolution G-3304," Application (A.) 01-12-050. On December 21, 2001, Tenby filed its "Petition For Modification, Or In The Alternative For Clarification, Of Resolution No. G-3304," A.01-12-042.⁵ Tenby filed a protest to SoCalGas' application on February 1, 2002. SoCalGas filed a response to Tenby's application on January 31, 2002, and Tenby filed a reply to SoCalGas' response on February 11, 2002.

On January 31, 2002, SoCalGas filed a motion with the Commission to consolidate the two applications. The motion to consolidate was granted in an administrative law judge's (ALJ) ruling dated March 7, 2002. In that ruling, the parties were also directed to file a response as to "why the Commission should proceed with hearings or a decision regarding the clarification or modification of the Resolution, when that issue is central to the pending civil matter." (March 7, 2002 Ruling, p. 5.) Responses to the ruling were filed on March 22, 2002 and March 25, 2002 by Tenby and SoCalGas, respectively. Tenby and SoCalGas also filed replies to each other's responses on April 8, 2002.

On February 7, 2003, the scoping memo and ruling was issued for these proceedings. Among other things, the scoping memo and ruling determined that

⁵ Both applications were originally tendered for filing as petitions for modification of the Resolution. The Commission's Docket Office changed the petitions for modification to applications.

because the Commission has no jurisdiction to award the kind of damages that Tenby is seeking, the Commission would not hold any hearings “into whether the December 7, 2000 letter notice created a contract, whether SoCalGas breached such a contract, and whether damages are due to Tenby for the alleged breach.” (Scoping Memo and Ruling, p. 9.)

Issues to be Resolved

The ultimate issue that both parties seek to resolve is whether or not Tenby was entitled to GN-10 gas service from SoCalGas for the month of January 2001. A Commission decision which clarifies or modifies the Resolution in the manner requested by Tenby or SoCalGas, could have a significant impact on the outcome of the pending litigation in the Superior Court.

The March 7, 2002 ALJ ruling recognized that the Commission is reluctant to issue a decision in response to a request for declaratory relief, and directed the parties to explain why the Commission should clarify or modify the Resolution. Thus, before addressing the issue of whether the Resolution should be clarified or modified, we must determine whether the applications of Tenby and SoCalGas are requests for declaratory relief. If the applications are requests for declaratory relief, then we must address whether compelling reasons exist for us to clarify or modify the Resolution.

The final issue to address in this decision is the status of Tenby’s discovery efforts.

Position of the Parties

A. Tenby

Tenby takes the position that it had a written contract to take GN-10 service from SoCalGas on December 7, 2001, as evidenced by Exhibit A to the Declaration of Julie Chase, and that this service was to be provided by SoCalGas

beginning on January 1, 2001.⁶ Tenby contends that SoCalGas breached the contract by failing to provide service to Tenby in January 2001. As a result, Tenby had to use a different provider to supply gas for the month of January 2001.

Since Tenby had already entered into a contract with SoCalGas before the effective date of the Resolution, Tenby asserts that the Resolution did not invalidate the contract because there was no “transfer” to suspend as contemplated by the Resolution.

Tenby requests that the Commission “clarify the Resolution so it is clear that the Resolution did not invalidate core subscription contracts, such as Tenby’s, that were entered into by SoCalGas prior to the effective date of the Resolution.” (A.01-12-042 Application, p. 17.) In support of its position, Tenby points out that the Resolution recognized Tenby’s protest letter, adopted some of Tenby’s arguments, and sought to protect “current core customers from possible harm.” (Resolution, p. 9.)

If the Commission can award damages to Tenby for SoCalGas’ actions, then Tenby requests an opportunity to present an accounting of the damages. If the Commission cannot award damages to Tenby, Tenby states that the Commission “should make clear that it did not intend to invalidate existing

⁶ Tenby states in footnote 9 of its application and footnote 12 of its protest to A.01-12-050 that it originally requested a contract for core service from SoCalGas in November 2000 for service beginning on December 1, 2000, and that SoCalGas’ representatives tentatively agreed but needed management approval first. SoCalGas subsequently notified Tenby that it could not receive such service until January 1, 2001, because of the requirement that the party provide 20 days’ notice before service begins.

contracts and SoCalGas' improper attempts to profit from the Resolution should not be any further sustained." (A.01-12-050, Tenby Protest, pp. 16-17.)

SoCalGas contends that it did not have a contract to provide Tenby with GN-10 service because no written agreement granting Tenby's request was entered into by SoCalGas. Tenby points out, however, that the Energy Division's informal opinion stated that an "Application for core service (GN-10) does not require a signed contract," and that the informal "opinion held that Tenby's date of transfer to be a GN-10 customer was December 7, 2000." (A.01-12-050, Tenby Protest, p. 5.) Tenby also points out that SoCalGas' letter of January 31, 2001 to the Energy Division admitted that "no written contract is required for service under schedule GN-10." (Declaration Of Julie Chase, p. 6, Exhibits B and H.) Contrary to SoCalGas' assertion, Tenby contends that during the January 31, 2001 teleconference, SoCalGas did not specifically deny that Tenby's letter of December 7, 2000 established a contractual relationship.

Tenby further asserts that the date for delivery of the product is irrelevant in determining when the contractual relationship was established between the parties. Tenby contends that the "rights, benefits, and obligations of the contract become effective at the time of the contract even though the actual performance may occur at a later date," and that the Commission "would not and could not have intended to confuse the date of entry into a contract for a change of service, December 7, 2000, with the date of delivery of the natural gas, January 1, 2001. (A.01-12-042 Application, p. 9; A.01-12-050, Tenby Protest, p. 7.) If SoCalGas' position is upheld, Tenby contends this would allow any supplier to repudiate a contract on the day before it was to deliver the product.

Based upon the actions of SoCalGas' representatives, Tenby asserts that SoCalGas should be estopped from arguing that it had no contract with Tenby.

When BP notified Tenby in November 2000 that BP was terminating its gas supply contract, Tenby contacted SoCalGas, who then “solicited Tenby to enter into a contract for its Schedule GN-10 service and enable SoCalGas to become both Tenby’s provider and transporter of gas.” (A.01-12-042, Tenby Reply, p. 2.) After repeated solicitations from SoCalGas and other providers, Tenby elected to take service from SoCalGas and “explicitly followed SoCalGas’ instructions to do so.” (Id.) Tenby relied on SoCalGas’ representations that SoCalGas would provide GN-10 service to Tenby beginning on January 1, 2001, and Tenby therefore did not enter into any other contracts for natural gas service.

Tenby asserts that Tenby and SoCalGas had a definite “meeting of the minds” when Tenby entered into the contract on December 7, 2000, and that both sides understood the terms and conditions of the contract. Although SoCalGas argues that Tenby wanted core subscription service rather than bundled core service, Tenby contends that neither party ever claimed confusion as to the type of service at issue in the contract until SoCalGas filed its response to Tenby’s petition to modify the Resolution.

Tenby also contends that SoCalGas recognized the contract beginning on February 1, 2001. Tenby asserts that if a contract did not exist, as alleged by SoCalGas, then “what currently governs SoCalGas’ provision of Schedule GN-10 service to Tenby and Tenby’s payments for such service.” (Id. at p. 3.) Tenby also contends that when it decided to return to core service beginning on January 1, 2002, SoCalGas refused to allow Tenby to do so, citing SoCalGas’ tariff Rule 19, which does not permit a transfer until after 12 months of service under the schedule.

Tenby further contends that SoCalGas’ clarification or modification would violate the contract clause of the United States and California

constitutions because SoCalGas is seeking a retroactive application of laws or regulations to invalidate or impair the obligation of an already existing contract. Tenby agrees that the Commission can prospectively alter contracts subject to its jurisdiction, but the Commission cannot retroactively alter a contract's past terms. Tenby also asserts that SoCalGas' interpretation discriminates against Tenby because Tenby's existing contract would be invalidated while others with GN-10 contracts would be continued.

Tenby also argues that if the Resolution is modified as recommended by SoCalGas, that this would violate Tenby's due process rights because the advice letters addressed in the Resolution did not raise the issue of whether contracts that were entered into before the effective date of the Resolution should be suspended. Instead, the advice letters only proposed a change to a two-tiered level of core customers.

Tenby also contends that fairness and equity demand that SoCalGas should not be rewarded for its conduct regarding these events. Tenby points out that it entered into a core service contract as a result of SoCalGas' repeated solicitations, which promised great savings. At about the same time, SoCalGas was attempting to drastically change the rates associated with such service by filing advice letters proposing the two-tiered system. After the Resolution was adopted, SoCalGas did not inform Tenby of its interpretation of the Resolution until the last week of 2000, forcing Tenby to find a replacement provider at the last moment. Tenby notes that the Resolution acknowledged the unfairness of SoCalGas' conduct when it stated that "SoCalGas seeks to change the rules just as customers seek to exercise the option they believed was available to them." (A.01-12-042 Application, p. 11; Resolution G-3304, pp. 8-9.) Tenby also contends that SoCalGas' actions with regard to the advice letters and the Resolution

attempt to take advantage of “whatever interpretation afforded SoCalGas the greater profit....” (A.01-12-042 Application, p. 12.)

Tenby also points out that when SoCalGas filed Advice Letter 2981 with the Commission, it failed to serve a copy on Tenby. This advice letter contained language which favored SoCalGas’ interpretation of the Resolution. The Energy Division struck this language as going beyond the Resolution. Tenby contends that SoCalGas’ actions evidence a motivation on SoCalGas’ part to deny Tenby a contract for GN-10 service.

Tenby also contends that despite repeated requests in January 2001, SoCalGas has not provided any support for its contention that if a contract exists between Tenby and SoCalGas, that several other written notices of election for core service would have to be recognized as well, which SoCalGas argues would overwhelm the core portfolio. Tenby refers to this as SoCalGas’ “parade of horrors argument.” Tenby points out that the Energy Division’s informal opinion stated that no other non-core customers made such a request in writing. Tenby also cautions the Commission to carefully scrutinize the materials that SoCalGas supplied to the Energy Division on April 9, 2001, more than two months after the January 31, 2001 teleconference, regarding other end users whose circumstances of electing service are allegedly similar to Tenby’s. (See A.01-12-042 Application, pp. 14-15; Declaration Of Julie Chase, Ex. K.)

Tenby also notes that a draft decision was issued in A.01-02-015, which recommends that all wholesale customers of SoCalGas be allowed to take core subscription service. A.01-02-015 is a proceeding in which the City of Long

Beach (Long Beach) seeks to modify Resolution G-3304.⁷ SoCalGas and San Diego Gas & Electric Company support Long Beach's petition to modify the Resolution in that proceeding. Tenby contends that since SoCalGas openly welcomes massive users into its core service portfolio, any argument of SoCalGas about the adverse impact of allowing Tenby, a small user, and any other customers from taking core service, cannot be given much weight.

B. SoCalGas

SoCalGas contends that the Commission's intent in Resolution G-3304 was to suspend all noncore customers, except for those customers whose gas provider was no longer providing gas service in California and those who were actually receiving core or core subscription service, from switching to core or core subscription service effective December 21, 2000. SoCalGas contends that the Resolution recognized that many of SoCalGas' noncore customers were requesting core or core subscription service because of the rapid rise in natural gas prices. Although the Commission was aware that these requests had been made before the issuance of the Resolution, SoCalGas contends that the Commission did not create any exception for these noncore customers. Instead, the "Commission merely ordered SoCalGas to suspend transfers of noncore customers to either core or core subscription service, but did not state that Tenby, or any other noncore customer who had requested core or core subscription service, should be exempted from the suspension, other than those customers

⁷ The draft decision was subsequently taken off the Commission's agenda, and the City of Long Beach requested dismissal of the application, which was granted in D.03-03-004.

whose gas supplier was no longer offering service in California.” (A.01-12-050 Application, p. 4.)

According to SoCalGas, the advice letters that were filed in December 2000 set forth SoCalGas’ concern that a transfer of a large volume of noncore service to either core or core subscription service would raise gas commodity costs for existing core and core subscription customers. The advice letters proposed that customers who transferred from noncore transportation service to core or core subscription service pay a price based upon the incremental cost of SoCalGas having to purchase additional gas supplies.

SoCalGas contends that the Resolution agreed with SoCalGas’ concerns, but rejected SoCalGas’ proposed solution. The Commission then ordered SoCalGas “to suspend transfers of customers to core subscription service, Schedule G-CS or applicable core service schedules, except for those customers where their gas service provider is no longer offering service in California.” (Resolution, OP 2, p. 12.)

In response to ordering paragraph 3 of the Resolution, SoCalGas filed Advice Letter 2981 on December 28, 2000 to implement the Resolution. According to SoCalGas, it:

“interpreted the Resolution to mean that noncore transfers to core or core subscription service effective January 1, 2001, were suspended and stated that ‘customers taking noncore transportation service on December 21, 2000 [the effective date of the Resolution], will not be eligible for core subscription or core service, except as identified in the above applicability statement [addressing customers whose supplier was no longer offering service in California], even if they requested the transfer prior to December 21, 2000, since such service would not begin until January 1, 2001, which is

after the effective date of Resolution G-3304.’ ” (A.01-12-050 Application, pp. 4-5.)

Although SoCalGas “inadvertently failed to serve Tenby with a copy of the Advice No. 2981 when it was filed,”⁸ Tenby filed a late-filed protest to this advice letter. SoCalGas states that the essence of Tenby’s protest is that it should be permitted to take core service as of January 1, 2001, because it had a contract with SoCalGas to take such service, which pre-dated the issuance of the Resolution. SoCalGas’ response to Tenby’s protest asserted that SoCalGas had not executed any written agreement with Tenby, and had only received a written request for core service from Tenby.

On February 2, 2001, in response to Advice Letter 2981, the Energy Division sent a letter to SoCalGas stating that SoCalGas should remove from its tariffs the language addressing whether noncore customers should be permitted to transfer to core or noncore service if they were not taking such service as of the effective date of the Resolution. The letter stated that this language “goes beyond compliance with Resolution G-3304.”

SoCalGas contends that it never had a contract with Tenby, and did not execute any written agreement granting Tenby’s written request for GN-10 service. In order for there to be a contract between Tenby and SoCalGas, SoCalGas states that there has to be a mutual obligation by SoCalGas to provide GN-10 service to Tenby, and for Tenby to take and pay for that service.

SoCalGas also contends that there was no “meeting of the minds” on the material terms and conditions of the alleged contract. SoCalGas contends

⁸ A.01-12-050 Application, p. 5, fn. 6.

that any agreement with Tenby would have also been governed by provisions that give the Commission jurisdiction over any such agreement, and that the Commission can modify any such obligation at any time. The Commission did so by adopting the Resolution which prevented Tenby and all other noncore customers from taking GN-10 service.

SoCalGas also argues that no contract existed between Tenby and SoCalGas because Section X.A. of the Commission's General Order 96-A requires that any contract seeking public utility service at rates or conditions other than what is contained in the tariff schedules requires Commission approval. SoCalGas asserts that since no such authorization was ever obtained, there can be no valid and enforceable contract between SoCalGas and Tenby.

As for Tenby's contract clause argument, SoCalGas asserts that the contract clause is not violated when the power to make changes is expressly reserved to the state. Thus, if a contract existed between Tenby and SoCalGas, SoCalGas states that General Order 96-A permits the Commission to modify any such contract without violating the contract clause.

With respect to Tenby's due process argument, SoCalGas points out that Tenby protested the advice letters and the Resolution acknowledged and summarized Tenby's protest. Thus, SoCalGas contends that Tenby had an opportunity to be heard before the Resolution was adopted. In addition, since Tenby and SoCalGas seek clarification or modification of the Resolution, Tenby has yet another opportunity to make its views known to the Commission.

SoCalGas also points out Tenby's confusion over "core service" and "core subscription service." Tenby asserts that SoCalGas solicited Tenby to enter into a contract "for its core service" and that "Tenby accepted the SoCalGas offer of core subscription service by sending SoCalGas written notice that Tenby

terminated its Master Service Contract and Interstate Transmission Agreement with SoCalGas.” (A.01-12-042 Application, pp. 3-4.) Tenby’s petition also states that the December 7, 2000 notice “clarified that Tenby elected to take service under SoCalGas tariff schedule no. GN-10 (core subscription service).” (Id., p. 4.) SoCalGas states that GN-10 service is not core subscription service, but rather bundled core transportation and commodity service. Core subscription service, on the other hand, is where noncore customers continue to take noncore transportation service, but elect to purchase gas commodity from SoCalGas rather than from an alternative gas supplier.⁹

Since Tenby was allegedly offered core subscription service by SoCalGas, and Tenby wrote to SoCalGas on December 7, 2000 that it would take GN-10 service, SoCalGas contends that no contractual relationship exists because it did not accept Tenby’s “counteroffer” to take GN-10 service. In support of its argument that it did not accept Tenby’s counteroffer, SoCalGas points out that Tenby filed a protest to Advice Letters 2978 and 2979 because Tenby knew that approval of the advice letters would prevent it from taking the GN-10 service that Tenby had offered to take from SoCalGas beginning on January 1, 2001.

Although a contract is not necessary to elect GN-10 service, SoCalGas asserts that this is not an admission on its part that Tenby’s December 7, 2000 letter created a contract between SoCalGas and Tenby. SoCalGas also points out that the Energy Division’s informal opinion did not agree that a contract had

⁹ SoCalGas points out that in D.01-12-018, which was issued in December 2001, the Commission removed core subscription as an option. Thus, if Tenby’s interpretation of the Resolution prevails, noncore customers could switch to core service, but may not transfer to core subscription.

been created, but instead merely stated that an “Application for core service (GN-10) does not require a signed contract.” SoCalGas also contends that during the January 31, 2001 telephone conference, SoCalGas’ representatives specifically denied that Tenby’s December 7, 2000 letter established a contract.

Based on the Energy Division’s informal opinion, SoCalGas allowed Tenby to take GN-10 service effective February 1, 2001. However, SoCalGas believes “that the intention of the Resolution was to prevent all noncore customers, including Tenby, from switching to core or core subscription service unless they were actually taking such service as of the effective date of the Resolution or their gas supplier was no longer offering service in California....” (A.01-12-050 Application, pp. 5-6.)

SoCalGas points out that as of December 7, 2000, Tenby was not a core customer, nor was it taking core subscription service. Instead, Tenby was taking noncore interruptible service in December 2000. Thus, Tenby’s argument that it was a core subscription customer as of December 7, 2000, has no merit.

Even if SoCalGas had a contract with Tenby, SoCalGas contends that the Resolution changed the eligibility requirements for GN-10 service, and specifically prohibited the type of transfer requested by Tenby. Although Tenby requested that its GN-10 service commence on January 1, 2001, SoCalGas could not provide Tenby with such service because the Resolution precluded transfers to GN-10 service.

In response to Tenby’s argument that “fairness and equity” require that the Resolution be interpreted in a manner favorable to Tenby, SoCalGas asserts that Tenby’s version of the facts are irrelevant to the Commission’s intent behind the Resolution. For example, SoCalGas asserts that the solicitation of Tenby for GN-10 service was not unusual, and that SoCalGas informed all of its noncore

customers about available service options when asked. As for Tenby's allegation that it was "forced to scramble" during the last week of December 2000 to make arrangements to purchase gas, SoCalGas states that this was Tenby's fault because it was aware of the relief requested in the advice letters but failed to take timely action in the event the advice letters were granted.

Regarding Tenby's argument that the Resolution "adopted Tenby's protest," SoCalGas states that language of the Resolution was intended to address the two-tier system that SoCalGas had proposed in the advice letters,

and “was not intended to permit Tenby, or any other customer who had requested core service or noncore core subscription service on or before December 11, 2000, to slip out from under the suspension ordered by Resolution G-3304.” (A.01-12-042, SoCalGas Response, pp. 15-16.)

Tenby also argues that SoCalGas has interpreted the Resolution in a manner that affords SoCalGas a greater profit. SoCalGas asserts that any increase in transportation revenues caused by Tenby’s switch from a noncore rate to a core rate would be credited to the Core Fixed Cost Account and not to SoCalGas’ shareholders. As for Tenby’s gas volumes, SoCalGas states that the volumes are relatively small, and the transfer of just Tenby to core service would not affect SoCalGas’ gas commodity costs. However, if all the noncore customers in a position similar to Tenby are allowed to take core service without complying with any conditions that the Commission might adopt in A.01-01-021, this could raise SoCalGas’ gas commodity portfolio prices. Thus, contrary to Tenby’s assertion that SoCalGas is reciting a “parade of horrors,” SoCalGas contends that it is merely presenting factual data about the impact of customers transferring from noncore service to core or core subscription service.

Tenby also asserts that SoCalGas prevented Tenby from returning to noncore service until February 1, 2002. SoCalGas states that its Rule No. 19 prohibits a transfer from one schedule to another except after 12 months of service under the schedule. Since Tenby did not start taking GN-10 service until February 1, 2001, Tenby was barred from returning to noncore service until February 1, 2002.

Tenby also referred to the draft decision in A.01-02-015. SoCalGas points out that the draft decision was taken off the Commission’s agenda, and

the issue is now before the Commission in A.01-01-021, which is the application SoCalGas filed in compliance with the Resolution.

Although the Energy Division's informal opinion stated that Tenby should be allowed to switch to GN-10 service because Tenby's request had been submitted in writing prior to the tariff deadline for establishing core subscription service beginning January 1, 2001, and before the Resolution was issued, SoCalGas contends that the informal opinion was based on the assumption that no other non-core customers had made such a request in writing.

On April 9, 2001, SoCalGas sent a letter to the Energy Division stating that the informal opinion did not provide SoCalGas with sufficient guidance on how other noncore customers, who had made requests similar to Tenby, should be treated. SoCalGas contends that the April 9, 2001 letter documents that a significant volume of SoCalGas' noncore transportation service requested core or core subscription service at least 20 days before January 1, 2001. SoCalGas asserts that many of these requests were in writing, and the Energy Division's informal opinion incorrectly assumed that Tenby was the only noncore transportation customer requesting core or core subscription service in writing. SoCalGas states that:

“If the Commission permits a transfer to core or core subscription service by any noncore transportation customer that requested such service prior to the effective date of the Resolution, without the need to comply with any conditions the Commission decides to adopt in A.01-01-021, there could be a significant volume of SoCalGas' noncore service that elects core or core subscription service to insure against future run-ups in the price of gas.”

SoCalGas' April 9, 2001 letter requested the Commission to clarify whether these other customers should be permitted to switch effective January 1,

2001. Tenby responded to the April 9, 2001 letter. The Energy Division subsequently notified SoCalGas that it did not intend to address the matter further and would not prepare a Resolution for the Commission's consideration.

SoCalGas requests that the Commission clarify whether the effective date of Resolution G-3304 was intended to prevent noncore transportation customers from switching to core service effective January 1, 2001, regardless of whether the noncore customer requested core or core subscription service prior to the effective date of the Resolution.

SoCalGas requests that the Resolution be modified and clarified by including the following proposed finding of fact and ordering paragraph:

Proposed Finding of Fact

"To permit noncore customers of SoCalGas that are not actually receiving core or core subscription service as of the effective date of this resolution to transfer to core or core subscription service effective January 1, 2001 – even if they have requested core or core subscription service from SoCalGas within the time otherwise permitted in SoCalGas' tariffs – would adversely affect existing core and core subscription customers."

Proposed Ordering Paragraph

"Noncore customers of SoCalGas that are not actually receiving core or core subscription service as of the effective date of this resolution are not permitted to transfer to core or core subscription service effective January 1, 2001, even if they have requested core or core subscription service from SoCalGas within the time otherwise permitted by SoCalGas' tariffs." (A.01-12-050 Application, Proposed Modifications.)

If the Commission decides to exempt noncore transportation customers requesting core or core subscription service prior to the adoption of the Resolution or the 20-day cutoff in SoCalGas' tariffs, SoCalGas recommends that

this exemption be done on a prospective basis only. SoCalGas contends that any new exemption should not be made retroactive to January 1, 2001 because these noncore transportation customers, who would now be deemed eligible, have probably already paid their gas supplier for the gas that they have purchased since January 1, 2001. Since SoCalGas has billed these customers only for noncore transportation service, it would not be appropriate to bill these customers for the gas that SoCalGas did not purchase on their behalf.

Discussion

We preface our discussion with the caveat that our analysis does not focus on whether or not the December 7, 2000 letter from Tenby to SoCalGas created a contract for service. Although the contract formation issues were raised in the lawsuit and in the applications, they are not dispositive of what the Commission needs to examine. Our focus is on whether or not the Resolution should be modified or clarified, and if so, whether the intention of the Resolution was to preclude all transfers into core subscription or core service on and after December 21, 2000.

The first issue to address before reaching the issue of whether the Commission should modify or clarify Resolution G-3304, is whether the requests of Tenby and SoCalGas amount to requests for declaratory relief or an advisory opinion. As noted in the March 7, 2002 ALJ ruling and the February 7, 2003 scoping memo and ruling, the Commission generally disfavors issuing a decision that provides declaratory relief (D.97-10-087 [76 CPUC2d 287, 325,-326]; D.97-09-058 [75 CPUC2d 624, 625]; D.91-11-045 [abstracted at 42 CPUC2d 9]), or which is advisory in nature (D.97-09-058 [75 CPUC2d 624, 625]).

Tenby's lawsuit against SoCalGas and Sempra involves, among other things, Tenby having to purchase natural gas in January 2001 due to SoCalGas'

alleged breach of contract to provide Tenby with GN-10 service during that month. Although the Resolution was not mentioned in Tenby's complaint in the lawsuit, SoCalGas demurred to the complaint on the grounds that the Superior Court lacks subject matter jurisdiction over the issues raised in Tenby's civil complaint, and that the court cannot review the Resolution. (Tenby Response To March 7, 2002 Ruling, Exh. 2.)

Both Tenby and SoCalGas stipulated to stay the lawsuit until the Commission addresses their respective applications to modify or clarify the Resolution. Tenby requests that the Commission clarify or modify the Resolution to state that anyone who elected to take core subscription or core service from SoCalGas prior to the effective date of the Resolution is not barred from taking such service. SoCalGas requests an interpretation that would prevent a noncore customer who elected core subscription or core service before the effective date of the Resolution from transferring to core or core subscription service beginning on January 1, 2001.

SoCalGas contends that it is not asking the Commission to adjudicate the specific rights of any party, or to adjudicate the pending civil suit. SoCalGas states that it is "not seeking a declaratory order from the Commission, but instead is requesting modification/clarification of Resolution G-3304." (SoCalGas 3/25/02 Response, p. 2.) However, it is clear that the applications of both SoCalGas and Tenby are requesting that the Commission interpret the Resolution in a way that will affect the pending Superior Court action involving Tenby's purchase of natural gas from an entity other than SoCalGas in January

2001.¹⁰ Thus, we conclude that the applications of Tenby and SoCalGas to clarify or modify Resolution G-3304 are requests for declaratory relief.

Although the Commission generally disfavors issuing a decision in response to a request for declaratory relief or an advisory opinion, the Commission has made some exceptions. The Commission has issued decisions which provide declaratory relief or are advisory in nature when extraordinary circumstances exist, or if the matter is of widespread public interest.

(D.97-09-058 [75 CPUC2d 624, 626]; D.95-01-014 [58 CPUC2d 470, 476]; D.93-08-030 [50 CPUC2d 518, 521]; D.91-11-045 [42 CPUC2d 9]; D.87-12-017 [26 CPUC2d 125, 130].)

Even if their applications are deemed to be requests for declaratory relief, SoCalGas states in its response to the March 7, 2002 ruling, and Tenby's reply of April 8, 2002 agrees, that there are legal and policy reasons for issuing a decision in response to a request for declaratory relief. Thus, the next issue we address is whether the legal and policy reasons cited by SoCalGas are sufficient to justify issuing a decision which provides declaratory relief or which is advisory in nature.

The first reason that SoCalGas cites in support of the issuance of a Commission decision clarifying or modifying the resolution is Public Utilities Code Section 1759. That code section provides in part that "[n]o court of this state, except the Supreme Court and the court of appeal ... shall have jurisdiction

¹⁰ We are not persuaded by SoCalGas' argument that its application should not be considered a request for declaratory relief because the Resolution may affect other noncore customers besides Tenby. It is apparent that if the Commission interprets the Resolution as suggested by Tenby or SoCalGas, the Resolution will have a direct impact on the pending civil matter.

to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties....”

SoCalGas contends that this code section prevents the Superior Court from taking any action that would have the effect of overruling a Commission decision or resolution. The basis for SoCalGas’ demurrer to the civil action is that the Superior Court lacks subject matter jurisdiction to interpret the Resolution, and that several court cases have prevented the trial courts from hindering or frustrating the policies of the Commission.

SoCalGas also contends that when the Superior Court examines the Resolution, it may decide that the Resolution is ambiguous. Because of the potential ambiguity, SoCalGas contends the Commission should determine the meaning of its own decisions and resolutions as a policy matter. SoCalGas states that since the Commission and the staff were directly involved with the Resolution, the Commission is in a far better position than the trial court to determine the meaning of the Resolution. If the Resolution is ambiguous, Tenby contends that a hearing should be held to properly determine the intent of the Resolution.

SoCalGas further contends that having the Commission interpret the Resolution will promote one of the purposes of the “primary jurisdiction doctrine,” which is to ensure the uniform application of regulatory policy. SoCalGas also contends that the Commission should not establish the precedent of deferring to the civil court to interpret a Commission decision or resolution.

We first note that Tenby’s civil action is premised on a breach of contract theory, and that Tenby is seeking damages from SoCalGas. Before the Superior Court even addresses the effect of the Resolution, it must determine if a contract

for GN-10 service was formed. This issue of contract formation is certainly within the Superior Court's jurisdiction. If a contract is found to exist, the Superior Court must then determine if SoCalGas' performance of the contract should be excused because of the suspension initiated by the Resolution. At that point, the Superior Court will need to examine the language of the Resolution to determine its effect on the contract.

We are not convinced that the cases cited by SoCalGas in footnote 7 of its response to the March 7, 2002 ALJ ruling are applicable to Tenby's civil action. Those cases rely on the holding in Waters v. Pacific Telephone Company (1974) 12 Cal.3d 1, and other cases, which have held that:

“Under the *Waters* rule, ... an action for damages against a public utility pursuant to [Public Utilities Code] section 2106 is barred by section 1759 not only when an award of damages would directly contravene a specific order or decision of the commission, i.e., when it would ‘reverse, correct, or annul’ that order or decision, but also when an award of damages would simply have the effect of undermining a general supervisory or regulatory policy of the commission, i.e., when it would ‘hinder’ or ‘frustrate’ or ‘interfere with’ or ‘obstruct’ that policy.” (San Diego Gas & Electric Company v. Superior Court (1996) 13 Cal.4th 893, 918.)

As mentioned above, the Superior Court must first address in this proceeding the issue of whether a contract has been formed, before it even considers the issue of how the Resolution affects the contract. This situation is distinguishable from the Waters case wherein the plaintiff sued the telephone utility because of an alleged failure of the defendants to provide adequate phone service. The California Supreme Court held in Waters that because a tariff provision limited the liability of the telephone utility, the plaintiff's action for damages, which exceeded the limitation of liability, was barred by Public

Utilities Code Section 1759. Unlike the Waters case, there is no applicable statute or tariff provision which limits the amount of damages that Tenby is seeking.

It should also be apparent to the Superior Court that Public Utilities Code Section 1759 prevents the trial court from reviewing, reversing, correcting, or annulling an order or decision of the Commission. Thus, if the Superior Court concludes that a contract existed between Tenby and SoCalGas, it must look at the plain language of the Resolution to determine if the Resolution permitted or barred Tenby from receiving GN-10 service beginning on January 1, 2001. Public Utilities Code Section 1759 clearly prevents the Superior Court from looking beyond the “four corners” of the Resolution.

The primary jurisdiction doctrine “applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.” (Farmers Insurance Exchange v. Superior Court (1992) 2 Cal.4th 377, 390, italics omitted.) As a result of the stipulation filed in the Superior Court action, the trial court has essentially exercised the primary jurisdiction doctrine and referred the issue of clarifying or modifying the Resolution back to us.

The issue of whether the Commission needs to clarify or modify the Resolution depends on whether extraordinary circumstances exist, or if the matter is of widespread public interest. We do not believe that either of these situations apply. First, neither Tenby nor SoCalGas have provided a compelling reason for us to clarify or modify the Resolution. Although SoCalGas warns that other noncore customers elected to take core transportation or core service before

the Resolution was adopted, none of these other alleged customers have complained to the Commission about the Resolution. Thus, Tenby and SoCalGas have not demonstrated that extraordinary circumstances exist, or that clarification or modification of the Resolution is of widespread interest.

Second, before the Superior Court addresses the applicability of the Resolution, it must decide whether a contract exists between Tenby and SoCalGas. Based on the pleadings of the parties in this proceeding and in the civil action, this contract formation issue is likely be hotly contested. However, this contract formation issue does not amount to an extraordinary circumstance, and is not of widespread interest. In addition, since Tenby is seeking damages from SoCalGas, the contract formation issue and any resulting damages are best left to the civil court. As the Commission stated in D.00-10-005:

“As a general rule, this Commission does not adjudicate contract disputes merely because one party is a public utility. Since the Commission has no jurisdiction to award damages, complaints alleging breach of contract are better served through the civil court.” (D.00-10-005, p. 4, citation omitted.)

And third, the Commission, through the issuance of Resolution G-3304, has already addressed the subject matter of Tenby’s dispute with SoCalGas. Tenby’s action against SoCalGas in Superior Court arising from the Resolution will not undermine the regulatory policy behind the Resolution.

Assuming the Superior Court concludes that a contract has been formed, only then will it need to decide if the Resolution suspended all of the contracts entered into before the effective date of the Resolution, or if the suspension only applied to those contracts entered into on or after the effective date of the

Resolution. However, due to Public Utilities Code Section 1759, the Superior Court will only be able to look at the plain meaning of the Resolution.

Since the Commission has expressed a reluctance to issue a decision in response to a request for declaratory relief, and because the parties have not convinced us that extraordinary circumstances exist, or that the clarification or modification of the Resolution is of widespread interest, we decline to issue a decision clarifying or modifying the Resolution. Furthermore, since Tenby is seeking damages from SoCalGas, that is a remedy that can only be awarded by the Superior Court as provided for in Public Utilities Code Section 2106. Accordingly, the applications of Tenby and SoCalGas to clarify or modify Resolution G-3304 are denied.

The last item of discussion is Tenby's request that the Commission address Tenby's data request to SoCalGas. Since today's decision denies both applications to clarify or modify Resolution G-3304, Tenby's data request to SoCalGas is moot.

Comments on Draft Decision

The draft decision of the administrative law judge (ALJ) in this matter was mailed to the parties in accordance with Public Utilities Code Section 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments on the draft decision were filed by SoCalGas on May 27, 2003. Reply comments were filed by Tenby on June 2, 2003. The comments of the parties have been considered, but none of their proposed changes have been adopted.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and John S. Wong is the assigned ALJ in this proceeding.

Findings of Fact

1. Resolution G-3304 was adopted by the Commission on December 21, 2000.
2. Ordering Paragraph 2 of the Resolution ordered SoCalGas “to suspend transfers of customers to core subscription service, Schedule G-CS or applicable core service schedules except for those customers where their gas service provider is no longer offering service in California.”
3. Ordering Paragraph 3 of the Resolution ordered SoCalGas to file a new advice letter with tariff language that implements the provision of Ordering Paragraph 2 within seven days, and stated that the effective date of that advice letter would be December 21, 2000, subject to the Energy Division’s review of the advice letter for compliance with the Resolution.
4. Tenby filed a civil lawsuit against SoCalGas in Los Angeles Superior Court on September 25, 2001.
5. The ALJ ruling of March 7, 2002 directed the parties to file a response as to why the Commission should proceed with hearings or a decision clarifying or modifying the Resolution, when that issue is central to the pending civil lawsuit.
6. Tenby and SoCalGas filed responses and replies to the March 7, 2002 ALJ ruling.
7. Tenby’s lawsuit against SoCalGas and Sempra involves, among other things, Tenby’s purchase of natural gas in January 2001 due to SoCalGas’ alleged breach of contract to provide Tenby with GN-10 service during that month.
8. Tenby requests that the Commission clarify or modify the Resolution to state that anyone who elected to take core subscription or core service from SoCalGas prior to the effective date of the Resolution is not barred from taking such service.

9. SoCalGas requests that the Commission interpret the Resolution to prevent a noncore customer who elected core subscription or core service before the effective date of the Resolution from transferring to core or core subscription service beginning on January 1, 2001.

10. Since Tenby's civil action is premised on a breach of contract theory, before the Superior Court even addresses the effect of the Resolution, it must determine if a contract for GN-10 service was formed.

11. If a contract is found to exist, the Superior Court must then determine if SoCalGas' performance of the contract should be excused because of the suspension initiated by the Resolution.

12. Although SoCalGas warns that other noncore customers elected to take core transportation or core service before the Resolution was adopted, none of these other alleged customers have complained to the Commission about the Resolution.

13. The contract formation issue does not amount to an extraordinary circumstance, and is not of widespread interest.

14. Since Tenby is seeking damages from SoCalGas, the contract formation issue and any resulting damages are best left to the Superior Court.

15. Neither Tenby nor SoCalGas have convinced us that we should clarify or modify the Resolution because extraordinary circumstances exist, or because the matter is of widespread public interest.

Conclusions of Law

1. The Commission generally disfavors issuing a decision that provides declaratory relief or that is advisory in nature.

2. The applications of both SoCalGas and Tenby are requesting that the Commission interpret the Resolution in a way that will affect the pending Superior Court action involving Tenby's purchase of natural gas from an entity other than SoCalGas in January 2001.

3. The applications of Tenby and SoCalGas to clarify or modify Resolution G-3304 are requests for declaratory relief.

4. Although the Commission generally disfavors issuing a decision in response to a request for declaratory relief or for an advisory opinion, the Commission has made some exceptions when extraordinary circumstances exist, or if the matter is of widespread public interest.

5. The issues of contract formation and damages are within the Superior Court's jurisdiction.

6. Public Utilities Code Section 1759 prevents the trial court from reviewing, reversing, correcting, or annulling an order or decision of the Commission.

7. If the Superior Court concludes that a contract existed between Tenby and SoCalGas, it must look at the plain language of the Resolution to determine if the Resolution permitted or barred Tenby from receiving GN-10 service beginning on January 1, 2001.

8. The applications of Tenby and SoCalGas to clarify or modify Resolution G-3304 should be denied.

9. Since this decision denies the applications of Tenby and SoCalGas to clarify or modify the Resolution, Tenby's data request to SoCalGas is moot.

O R D E R

IT IS ORDERED that:

1. The applications of Southern California Gas Company and Tenby, Inc. to clarify or modify Resolution G-3304 are denied.

2. Application (A.) 01-12-042 and A.01-12-050 are closed.

This order is effective today.

Dated _____, at San Francisco, California.